

DOCKET FILE COPY ORIGINAL
RECEIVED

NOV 23 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

Reply Comments In the Matter of)
)
Implementation of Sections 3(n) and)
332 of the Communications Act)
)
Regulatory Treatment of Mobile Services)

GN Docket No. 93-252

REPLY COMMENTS OF MOBILE MARINE RADIO, INC.

Martin W. Bercovici, Esq.
Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001
202-434-4144

November 23, 1993

No. of Copies rec'd
List ABCDE

015

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
NOV 23 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of)	
Sections 3(n) and 332 of the)	GN Docket No. 93-252
Communications Act)	
)	
Regulatory Treatment)	
of Mobile Services)	

REPLY COMMENTS OF MOBILE MARINE RADIO, INC.

Mobile Marine Radio, Inc. ("MMR"), by its attorney, respectfully submits these Reply Comments concerning the Notice of Proposed Rulemaking to implement Section 332 of the Communications Act, as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 ("OBRA"),^{1/} and in response to initial comments filed in this proceeding.

I. STATEMENT OF INTEREST

MMR is a common carrier which renders international maritime common carrier radiotelephony, radiotelegraphy and radiofacsimile services to furnish the telecommunications link between vessels operating at sea and land-based parties located throughout the United States and abroad. MMR, under its current management, has been a Commission licensee since 1947, when it rendered solely an international Morse code radiotelegraph service. MMR currently

^{1/} 58 Fed. Reg. 53,169 (Oct. 14, 1993).

operates the largest terrestrial maritime common carrier facility within the United States.

II. STATEMENT OF POSITION

A. Regulatory Classification of Maritime Services.

In discussion of the regulatory classification of existing services under the new definitions set forth in OBRA, the Commission proposes to classify public coast station licensees currently regulated as common carriers under Subpart J of Part 80 of the Rules as commercial mobile service providers.^{2/} MMR wholeheartedly endorses and supports this approach. This approach is consistent with the views of other parties commenting in the proceeding involved in maritime communications services.^{3/}

Common carrier status is extremely important to MMR. As a carrier, MMR enjoys the right to secure interconnection with other carriers pursuant to Section 201 of the Communications Act, should interconnection not be offered on a consensual basis. By contrast, a non-carrier is entitled to receive service, which need be offered by the serving carrier only pursuant to terms which are just, reasonable and non-discriminatory. The difference might be quite substantial. For example, the standard for interconnect of telephony service customers customarily entails two wire circuits. This level of

^{2/} NPRM at n. 47.

^{3/} See Comments of Mobile Telecommunication Technologies Corporation (Mtel) at pp. 5-7; Comments of Waterway Communications System at p. 3.

connection to the network is wholly inadequate to maintain quality service for HF communication.^{4/} Pre-divestiture, MMR was forced to resort to complaint procedures in order to secure four-wire interconnect with the landline telephone network. While the service and competitive environment are materially changed from that era, MMR nonetheless believes that common carrier status is essential in order to preserve its opportunity to render quality service to the user community.

On the tariff side, common carrier status also is essential to MMR in the rendition of service to the user community. As a common carrier, MMR tariffs its rates and charges. This is essential to MMR in order to establish the legal predicate for settlement of accounts with foreign ships through their designated accounting authorities. Moreover, Section 201 of the Act provides for the establishment of through routes and charges; and Section 203 provides for the filing of tariffs, including those containing the rates of connecting and concurring carriers. MMR functions as a connecting and/or concurring carrier for both telephony and telegraphy services. Were maritime deemed not to be a commercial mobile service, MMR's rights and

^{4/} Two-wire interconnection allows wide variations in audio quality, audio level, and signal-to-noise level. By contrast, these service elements are maintained within close tolerance throughout the four-wire interexchange network. Given that the radio signal between the vessel and the coast station must be amplified, MMR must have four-wire interconnect quality available in order to amplify the signal without degradation of the desired signal.

opportunities to participate in the tariffs of connecting carriers would be called into question.

MMR emphasizes the importance of common carrier status, notwithstanding the Commission's expressed intent to treat maritime carriers as commercial mobile service providers, due to the discussion in the Notice of qualifying conditions for commercial status. Specifically, the Commission addresses features such as frequency reuse,^{5/} direct interconnect versus store-and-forward operations,^{6/} and telephony versus non-telephony services.^{7/} MMR understands the Commission to have raised these considerations in the context of evaluating whether services which heretofore have been considered to be "private" should maintain the "private" classification or whether these services should be treated as "commercial" pursuant to the new provisions of Section 332 of the Act.^{8/}

Due to the operating environment and frequency availability in the maritime services, considerations of channel reuse -- an irrelevant consideration for HF channels which propagate hundreds and even thousands of miles, direct as contrasted with manual interconnect and telephony versus telex and Morse telegraphy modes, are

^{5/} NPRM at paragraph 32.

^{6/} NPRM at paragraphs 14-21 and 41.

^{7/} NPRM at paragraph 22.

^{8/} MMR distinguishes services which traditionally have been private in nature from maritime service which, while entailing common carrier service, have been under the regulatory jurisdiction within the Commission of the Private Radio Bureau.

inappropriate to evaluate whether the service is common carriage. By international treaty obligations of the Radio Regulations, the Communications Act and the Commission's rules and policies, maritime service must be held out to the public at large; and that is the touchstone of common carriage.

With regard to common carrier or commercial mobile services, the Commission invites comments on whether to permit commercial mobile service providers to render dispatch service in the future. The Commission notes that dispatch "has been predominantly a private land mobile service over the past decade."^{9/} (Emphasis added.) This issue arises by virtue of Section 332(c)(2) of the Act which, in pertinent part, is predicated upon an assumption that common carriers do not provide dispatch service.

"Dispatch communication" is defined at Section 22.2 of the Commission's rule as entailing a communication "between a dispatcher and one or more land mobile stations." Obviously, the statutory reference to dispatch communication contemplates only land mobile operation, and not maritime communication service.^{10/} In the maritime services, dispatch, in the broad sense of the term, has been part of the maritime operating environment for decades. Whatever the disposition of the Commission may be with regard to allowing dispatch communication by commercial mobile service providers licensed under

^{9/} NPRM at ¶ 42.

^{10/} See, also, former Section 332(c)(1), now superceded by OBRA and the new Section 332(c)(2) discussed herein.

Part 22 of the Rules, the Commission should at the very least exempt maritime carriers from the implication of Section 332(c)(2) that dispatch is not a permissible commercial mobile service.

B. Application of Title II to Commercial Mobile Services.

The Commission proposes to relieve maritime carriers of certain regulatory burdens of Title II of the Communications Act. Said authority was conferred upon the Commission in Section 332(c)(1) of the Act. MMR generally concurs with the proposals to forbear from Title II regulation, as proposed in the Notice.

One issue which warrants particular attention is the Commission's proposal to forbear from tariff regulation.^{11/} MMR urges the Commission to refrain from forbearance from tariffing requirements for commercial mobile service providers affiliated with connecting carriers, responsive to the issue raised at paragraph 64 of the Notice.

The Commission tentatively has concluded that maritime is a competitive service and proposed that maritime be classified as "non-

^{11/} MMR understands the Commission's proposal is to exempt commercial mobile service providers from the requirement to file and maintain tariffs. Thus, the determination of whether to file tariffs, or whether to operate without tariffs, would be the carrier's election. (See, discussion at p. 3, *supra*.) One issue not addressed in the Notice is whether a carrier which files a tariff may depart from that tariff on a selective basis, or whether the carrier must adhere to the tariff once one is filed. The former course of conduct should be proscribed as creating a festering environment for preference and discrimination, the prohibition of which are not subject to forbearance.

dominant" in the pending maritime rulemaking, PR Docket No. 92-257.^{12/} The Commission took cognizance in that rulemaking of the opportunity for discrimination and cross-subsidization wherein a maritime carrier is affiliated with a carrier providing connecting landline service.^{13/} This issue was addressed by MMR in Comments filed in December, 1991 on its Petition for Determination of Non-Dominant Common Carrier Status, File No. DF-88.001-DS.^{14/}

Inasmuch as maritime public coast station service necessarily must connect with landline carriers to receive and deliver message traffic, any maritime carrier affiliated with a landline carrier may receive an unjust, unwarranted and unlawful advantage where the landline carrier offers volume discounts and consequently applies the discount to the maritime service rates and/or applies the maritime traffic revenue to the traffic levels required to qualify for the volume discounts. Such "tying" arrangements are unlawful under fundamental principles of antitrust law; and the Commission has recognized that such opportunities for discrimination require the maintenance of full regulation over affiliated carriers. See, Regulation of International Common Carrier Services, 7 FCC Rcd 7331 (1992), errata, 8 FCC Rcd 452 (1993). Accordingly, MMR respectfully submits that the Commission must not forbear from regulation with

^{12/} 7 FCC Rcd 7863 (1992), at ¶ 31-36.

^{13/} Id. at ¶ 36.

^{14/} A copy of those Comments is associated herewith as Attachment 1 for convenient reference.

regard to commercial mobile service providers which are affiliated with connecting carriers and so have the opportunity to create anti-competitive tying arrangements.

MMR concurs with the views of the various mobile service carriers which urge the Commission to apply its forbearance powers with regard to Sections 225 and 226 of the Communication Act, concerning telecommunications services for speech and hearing impaired individuals and operator services, respectively.

In general, the conditions underlying these provisions are not applicable to MMR from an operational standpoint. Telex and Morse telegraphy services are not within the ambit of either provision; and in any event, the overwhelming majority of MMR's users are commercial vessels using MMR for business communications. Even for the small portion of traffic which entails general public use of MMR's radiotelephony service, these provisions have no bearing. As to Section 225, MMR's management does not recall any service requirement to speech or hearing impaired individuals calling for the use of a relay type service. With regard to Section 226, passengers on cruise vessels typically pay for ship-to-shore telephone calls on board the vessel; and MMR settles with the vessel operator. Pleasure craft operators customarily refrain from giving credit or calling card information over the air in order to preclude the opportunity for toll fraud. Typically, maritime customers have an established relationship with MMR; and billing thereby is handled on a pre-arranged basis. Any random calls which may entail billing to a non-registered calling card

usually involve a Marine Identification Number account.^{15/} Thus, there is no casual public use of MMR's service to which the regulatory scheme applied to operator services providers would be appropriate. Rather, the maritime user makes an informed choice of serving carrier, deals with a live operator, and customarily has an established relationship with the maritime carrier. This situation is completely inapposite to public payphone calling through an operator services provider, which is the situation addressed in Section 226 of the Act; and maritime and similar commercial mobile service providers should be excluded from the scope of these provisions.

Finally, MMR takes exception to the request of certain interexchange carriers that the Commission impose "equal access" obligations on commercial mobile service providers. In the maritime telex market, customers control the choice of MMR's connecting carrier by their designation of the address code for delivery of the message. Thus, whether the addressee code is an AT&T, IDB or MCI network number will determine which carrier MMR utilizes for delivery purposes. With regard to telephony, the choice of carrier may significantly impact upon call quality. As discussed at n.4, supra, concerning the impact of common carrier status on interconnection, the technical level of interconnection is critical to the maintenance of call quality. Operation through unbroken four-wire circuit quality (to the local

^{15/} Marine Identification Number accounts were established by AT&T decades ago as a special billing procedure for marine calls in order to minimize toll fraud opportunities. The MIN number is not accepted for call accounting purposes from landline pay telephones.

loop serving the land-based subscriber), particularly for single sideband operations in the MF and HF bands, is of paramount importance and so requires special interconnect arrangements which are not available with all IXCs. Accordingly, the application of equal access principles to the maritime environment is wholly inappropriate.

WHEREFORE, THE PREMISES CONSIDERED, Mobile Marine Radio, Inc., respectfully requests the Federal Communications Commission to (i) continue to recognize maritime public coast station service as a common carrier service under the new commercial mobile service provider classification, and (ii) implement regulatory policies under the Commission's forbearance policies consistent with the foregoing, and particularly to retain tariffing requirements for carriers capable of engaging in tying arrangements.

Respectfully submitted,



Martin W. Bercovici
KELLER AND HECKMAN
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001

Attorneys for
MOBILE MARINE RADIO, INC.

November 23, 1993

ED

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

DEC 23 1991

Federal Communications Commission
Office of the Secretary

In the Matter of)	
)	
Determination of)	
Non-Dominant Status of)	No. DF-88.001-DS
Common Carriers in the)	
Maritime Services)	

To: The Commission

**COMMENTS OF
MOBILE MARINE RADIO, INC.**

Mobile Marine Radio, Inc. ("MMR") respectfully submits the following Comments regarding its Petition for Determination of Non-Dominant Common Carrier Status, filed February, 1988, with particular reference to the market for international telex services.

I. INTRODUCTION

Mobile Marine Radio, Inc. is an international, full service maritime common carrier offering both telegraphy services, consisting of Morse telegraphy, narrow-band direct-printing (NB-DP or marine telex) and radiofacsimile, and also MF band (regional) and HF band (high seas) radiotelephony service. MMR also renders local radiotelephony service, operating in the VHF marine band and serving the Alabama coastal area south of Mobile, Alabama, Mobile Harbor and the Alabama Rivers.

II. BACKGROUND AND PURPOSE OF COMMENTS

With the adoption of the First Report and Order in the Domestic Competitive Carrier proceeding, the Commission divided carriers into two categories: dominant carriers for whom continuing rate regulation was justified, and non-dominant carriers for whom continuing rate regulation was not justified. Domestic Competitive Carrier (First Report and Order), 85 F.C.C.2d 1 (1980). Following the issuance of this Report and Order, the Commission issued a series of Report and Orders streamlining regulation for various categories of carriers. In the Commission's Fourth Report and Order, the Commission indicated that, on request, it would consider streamlining regulations for carriers or services which had not been specifically addressed, including public coast maritime mobile radio service. Domestic Competitive Carrier (Fourth Report and Order), 95 F.C.C.2d 554, 582 (1983). Subsequently, the Commission issued its Final Rule in International Competitive Carrier Policies streamlining regulation for carriers in two product markets -- the international telephone message service (IMTS) and non-IMTS (telex service). 59 Rad. Reg. 2d (P&F) 283 (1985). Although maritime service was not specifically mentioned in International Competitive Carrier, such service is considered to be an international service under Section 3(f) of the Communications Act. Furthermore, the Commission indicated in a

subsequent proceeding that International Competitive Carrier determined maritime service to be non-dominant.^{1/}

In response to the Commission's invitation in the Fourth Report and Order in Domestic Competitive Carrier, and to clarify the ruling in International Competitive Carrier, MMR, in conjunction with Waterway Communications System, Inc. (WATERCOM), a domestic maritime service provider, petitioned the Commission in February, 1988 to formally declare public coast maritime mobile radio services to be non-dominant, in both the domestic and the international markets. The Commission gave public notice to this Petition,^{2/} but has not taken further or final action.

At the time MMR submitted its Petition, there were six major point-to-point telex carriers in the international market, three of which also rendered maritime services.^{3/} Now, after several mergers and consolidations, three major carriers remain, all of which render both point-to-point and maritime telex

1/ See Elimination of Section 43.71 of the Commission's Rules, 3 FCC Rcd 588 (1988) (rescinding requirement for semi-annual reporting by public coast station operators).

2/ DA-88-897 (released May 8, 1988).

3/ At the time of International Competitive Carrier the following major carriers were competing in the telex market: Western Union, RCA Global Communications, ITT, TRT, Western Union International, and French Cable. Also, Graphnet and CCI rendered domestic and international telex service.

services.^{4/} With this consolidation, MMR finds itself increasingly squeezed from a marketing standpoint due to the tying of maritime service to the point-to-point telex service. This is so for two reasons: (i) for MMR, as for any maritime telex carrier, point-to-point service is essential to link MMR's facilities with the land-based user community so to receive messages destined for ships and to effect delivery of traffic received from vessels at sea, and (ii) no longer are there any independently-based (i.e., non-maritime operating) telex carriers or, conversely, any point-to-point telex customers who do not have direct access to, and incentives to use, maritime service offered by the point-to-point telex provider.^{5/}

The tying arrangements manifest themselves in two primary ways. First, the point-to-point telex carriers offer non-

4/ MCI purchased Western Union International and RCA Global Communications; Western Union and ITT merged, and are now owned by AT&T which has applied for maritime telex authority; and TRT and French Cable were consolidated into TRT/FTC.

5/ While Graphnet and CCI also render point-to-point telex service, their market shares are relatively small compared with MCI, Western Union, and TRT/FTC. For domestic routings, it is an economic necessity to route traffic via the carrier that can effect delivery. Unlike the public switched telephone network where subscribers have equal access opportunities, telex customers have direct service relationships with their telex carrier. In this environment, cross-over traffic, i.e., that which originates on the lines of one telex carrier and is delivered to a customer of another carrier, takes a severe rate penalty. See e.g., TRT/FTC Tariff FCC No. 8, § 2.01, which sets forth a charge of \$0.75/minute where TRT/FTC is the sole handling carrier, \$0.94 for crossover with CCI, \$1.09 for crossover with WU or WUI, and \$4.36 for crossover with Graphnet.

tariffed volume-sensitive discounts amounting up to 30% (and possibly more), which, once the qualifying volumes are satisfied, apply to both the point-to-point and maritime services. In practice, the volumes necessary to qualify for the non-tariffed discounts are satisfied by the point-to-point traffic, thus providing a free ride for the customer to obtain a discount on their maritime traffic. Maritime carriers which do not have the point-to-point service necessary to subsidize the volume discounts thus are severely disadvantaged in the marketplace. Second, landline telex carriers can and do provide free access to customers to reach their maritime stations. Such free access is available, for example, for service messages (e.g., inquiries as to status of message delivery). When utilizing MMR's maritime service, that same customer must send status inquiries or other service messages to MMR on a paid basis, or MMR must underwrite the cost as a collect message or through an In-WATS service.

MMR submits these Comments to its Petition for Determination of non-dominant status to update the Commission on the changes in the international telex market and to request that the Commission differentiate regarding the requested non-dominant classification, finding those carriers who offer both point-to-point and maritime telex services to be dominant carriers in the maritime market and those who render only maritime service to be non-dominant. In this manner, preservation of the tariffing requirement would render non-tariffed discounts and other similar

inducements unlawful, thereby "leveling the playing field." Alternatively, MMR requests the Commission to require dual authority telex carriers to operate their point-to-point and their maritime services on fully separated bases, thereby eliminating the tying arrangements.

III. THOSE CARRIERS POSSESSING BOTH LANDLINE AND MARITIME SERVICE SHOULD BE DECLARED DOMINANT CARRIERS IN THE MARITIME TELEX MARKET.

In the First Report and Order in Competitive Common Carrier, the Commission declared that market power was the governing standard for determining which carriers were dominant, 85 F.C.C.2d 1 (1980). Market power is defined as the "control a firm can exercise in setting the price of its output." Id. at 21. In that Report and Order, the Commission recognized that a firm with "market power is able to engage in conduct that may be anti-competitive or otherwise inconsistent with the public interest." Id. A firm lacking market power, however, must "take the market price as given, because if it raises the price it will face an unacceptable loss of business, and if it lowers the price it will face unrecoverable monetary losses in an attempt to supply the market demand at that price." Id.

Before conducting a market power analysis, one must determine both the relevant product market and the relevant geographic market. See Competitive Common Carrier, 95 F.C.C.2d

554, 562-75 (1983). The particular product market of concern to MMR is maritime telex services. In International Competitive Carrier the Commission determined that every country represents a geographic market,. See International Competitive Carrier Policies, 59 Rad. Reg. 2d (P&F) 283. Hence, the geographic market for MMR is the domestic land based telex market serving United States customers and interconnecting with foreign based PTTs. Within these geographic and product markets it is necessary to focus on particular market features to determine whether an entity has market power. These features include the ability to control bottleneck facilities, the number and size of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services.

At the time International Competitive Carrier was adopted the Commission concluded that "no carrier is dominant in the non-IMTS [telex] market." Id. at 290. The Commission determined that there was adequate competition in the market at the time so that "any non-IMTS service provider attempting to price uncompetitively will be met by market forces making such action difficult if not impossible to sustain." Id. at 297. With the consolidation of the market, however, this conclusion no longer holds true. Now the market is concentrated in three major carriers, all of which offer both point-to-point and maritime services, with five other maritime carriers having no landline affiliates. Furthermore these carriers control bottleneck facilities, i.e., landline service, that they, competitive

maritime carriers and customers of both must use to link the message originator/addressee with the maritime service facility. Control of bottleneck facilities has been found to be prima facie evidence of market power. Competitive Common Carrier (First Report and Order), 85 F.C.C. 2d at 21.

As noted above, these carriers are using their market power in the point-to-point service market to obtain market power in the maritime service market by tying their maritime service to their point-to-point service through the use of non-tariffed volume discounts applicable to both services and preferential access arrangements. This tying arrangement represents a form of cross-subsidization, and is an anti-competitive practice vis-a-vis independent maritime operators. If the point-to-point carriers are allowed to tie their landline service to their maritime service by use of volume discounts and preferential access, smaller carriers will be forced out of business, leaving the telex market concentrated in the three carriers providing both landline and point-to-point service.

The Commission recognized the anti-competitive effect of tying arrangements in AT&T's Private Payphone Commission Plan, 3 FCC Rcd 5834, 5837 (1988). In this decision the Commission found that AT&T's practice of tying its "0+" service to its "1+" service violated the policies behind the antitrust laws. In so doing, the Commission found that AT&T had been the "traditional

dominant provider in the "0+" market" and, therefore, had market power in the tying product which it attempted to use to obtain market power in the tied product. Id. In the instant case, the major carriers have market power by the fact that they control the point-to-point service, and they now are attempting to tie the maritime service to the point-to-point service to obtain market dominance in the maritime market. Such practice is anti-competitive and, therefore, should be eliminated.

IV. CONCLUSION

While there has been substantial and vigorous competition for maritime telex service, that competitive environment has become skewed due to tying arrangements offered to customers by those carriers who both control the essential point-to-point connecting arrangements and offer competitive maritime service. In these circumstances, deregulation of those carriers is unwarranted. Rather, full enforcement of the tariffing requirements and anti-discrimination provisions of the Communications Act are necessary to maintain a competitive environment.

WHEREFORE, THE PREMISES CONSIDERED, Mobile Marine Radio, Inc. respectfully requests that the Commission declare those carriers offering both maritime and point-to-point telex capabilities to be dominant carriers or, in the alternative, to

require these carriers to^{*} operate their maritime and landline services on a separated basis.

Respectfully submitted,



Martin W. Bercovici

Keller & Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
202-434-4144

Its Attorney

December 20, 1991